PRESIDENT'S RECOMMENDATION UNDER ARTICLE 117 OF THE CONSTITUTION OF INDIA

[Copy of letter No. F. 11 (2)/59-Leg. II, dated the 24th August, 1965 from Shri Jaganatha Rao, Deputy Minister of Law to the Secretary, Lok Sabha, New Delhi.]

The President having been informed of the subject matter of the Government (Liability in Tort) Bill, 1965, recommends to the Lok Sabha, under clause (3) of article 117 of the Constitution, the consideration of the Bill.

Notes on clauses

Clause 2.—This clause contains the definitions of important words and expressions used in the Bill some of which are based on the definitions suggested in paragraph 66.VI of the Report of the Law Commission on Liability of the State in Tort (hereinafter referred to as the "Report").

The Law Commission has suggested that "agent" shall have the same meaning as in the Indian Contract Act, 1872. But this suggestion has not been accepted as "agent" as defined in the Indian Contract Act is wide enough to include an "independent contract or" also. In the law of contract an "inde pendent contractor" may be regarded as an "agent" but in the law of tort there is an essential difference between an "agent" and an "independent contractor", but there is no such difference between an "agent" and a "servant" It is thus stated in Clerk and Lindsell on Torts (11th Ed. at page 116) while drawing a distinction between a "servant" and "contractor"—

> "Of the former class (servants) those whose employment is more or less continuous are usually styled

servants while those whose employment is intermittent or confined to a particular occasion are usually called by the generic name of agents. Between servants, however, and other agents over whom the employer reserves control, there is no distinction in point of law ; the employer is liable for the torts of the one to the same extent and subject to the same conditions as he is liable for the torts of the other. For the sake of brevity, therefore, it may be convenient to speak of all those classes of agents over whom the employer reserves control as servants in contradistinction to contractors over whom such control is not reserved."

[See also *ibid.* p. 135, Salmond on the Law of Torts (12th Ed. pp. 104 *et seq.*) ; Pollock's Law of Torts (15th Ed., pp. 62 and 63) ; Fleming, the Law of Torts, p. 357 ; Street, Law of Torts (1963), Chap. XXVII ; Performing Right Society, Ltd. *v.* Mitchell (1924), 1 K.B. 762. In this case the distinction between a servant and an independent contractor has been clearly brought out with refcrence to general principles laid down by well-known authorities · see also the case of Honeywill and Stein, Ltd. *v.* Larkin Brothers, Ltd. (1934) 1 K.B. 191 (C.A.) at pp. 196, 197].

The definition of "employee of the Government" is based on Article 310 of the Constitution.

The definition of " independent contractor " has been explained above.

The exact definition of " tort " is well nigh impossible as pointed out by the Law Commission, and therefore has not been attempted.

Clause 3.—Sub-clause (*a*) gives effect to the recommendation in paragraph 66. I (i) of the report and is modelled on section 2 (1) (a) of the U.K. Crown Proceedings Act, 1947 (hereinafter referred to as " the U.K. Act ").

This provision seeks to implement in relation to the Government the common law provision that a master is

vicariously liable to third parties for torts committed by his servants and agents in the course of their employment or for torts committed by his servants and agents for the master's benefit and subsequently ratified by the master.

Both in relation to an employee of the Government and an agent of the Government, the expression "in the course of his employement" has been used. There is no difference between "course of his employment" and "scope of his authority" "Scope of employment", "course of employment" "scope of authority" and "scope of service" mean practically the same thing. As stated in Winfield on Tort (Seventh Edition), p. 741, "course of employment seems to have supplanted scope of authority" These expressions are the formulae which are employed to indicate the outward limits of responsibility of the employer for the torts of his servants or agents. As Fleming states in his "Law of Torts" at p. 365,—

'That phrase (course of employment) like its variants "scope" or "sphere of employment" is the formula which is employed to indicate the outward limits of responsibility for the unauthorised wrongdoing of a servant and represents the judicial compromise between the "social necessity" of making a master answerable for the injury occasioned by servants entrusted with the power of acting in his business and the feeling that it would be unjust, and indeed undesirable, to make him responsible for every act which the servant chooses to do'

The proviso to section 2(1)(a) of the U.K. Act has been omitted for the reasons given in paragraph 19 of the Report.

Sub-clause (*b*) implements paragraph 66. I(iii) of the Report read with Appendix VI.B thereto. Compare in this connection section 40(2) (d) of the U.K. Act. See in this connection Clerk and Lindsell on Torts (Eleventh Edition), p. 137. The proviso to item (*iii*) of sub-clause (*b*) is, however, new because it is felt that it will not be fair and proper to make the Government liable under this item if there is an express stipulation in the contract between the Government and the independent contractor

that reasonable care in the doing of the act shall be taken by the contractor and not by the Government and the independent contractor shall, and the Government shall not be liable for any personal injury or any damage to property caused in the doing of the act by the failure on the part of the independent contractor to take such care.

The recommendation of the Law Commission [*vide* paragraph 66.I(i) of the Report] that the Government shall be liable for torts committed by employees or agents of public corporations or Government companies, has not been accepted because Government corporations or companies are separate juridical persons and there is no reason why the Government should be liable for the torts committed by the employees and agents of such corporations or companies.

Clause 4.—This clause implements paragraph 66.I(v) of the Report read with Appendix VI.E thereto. See also paragraph 24 of the Report. This Clause corresponds to section 2(1) (c) and section 40 (4) of the U.K. Act. See in this connection Clerk and likely in the ordinary course of events to cause such injury or Torts (Seventh Edition), Chapter 12.

Clause 5.—This clause implements paragraph 66.I(vi) of the Report read with Appendix VI.E(4) thereto.

The recommendations of the Law Commission in paragraph 66.II(ii) to (v) have been criticised as being rather too wide. It would appear that the position would be the same even if these recommendations were not implemented. Accordingly, these recommendations have not been included in any clause of the Bill. It has, however, been provided by sub-clause (*n*) of clause 11 that the Government shall not be liable in respect of any personal injury or any damage to property caused by an act which, by its nature, is likely in the ordinary course of events to cause such injury or damage, if the doing of the act is authorised by any enactment for the time being in force. This implements paragraph 66.II(i) of the Report.

Clause 6.—This clause implements paragraph 66.I(ii) of the Report read with Appendix VI.D thereto and follows

section 2(1) (b) of the U.K. Act and is based on Clerk and Lindsell on Torts (Eleventh Edition), pp. 390—395. A proviso has, however, been added that in awarding compensation to an employee of the Government the court shall take into account any amount payable under any other law [such as the Extraordinary Pension Rules, the Personal Injuries (Emergency Provisions) Act, 1962, the Personal Injuries (Compensation Insurance) Act, 1963, etc.] to such employee by way of compensation, disablement benefit, etc.

Recommendation of the Law Commission in paragraph 66.III of the Report has not been included in the Bill. The Law Commission without assigning any reason has simply recommended that a provision may be made on the lines of section 3 of the U.K. Act. In view of the special powers conferred on the Government by section 21 of the Patents and Designs Act, 1911 and section 20 of the Atomic Energy Act, 1962, in relation to patents, designs, etc., there is hardly any practical utility for such a provision. Even in regard to section 3 of the U.K. Act, Prof. Glanville L. Williams in his booklet on Crown Proceedings, p. 59, observes that there is little scope in the case of patents and designs, etc., for infringement actions notionally given by this clause, to operate. Implementation of this recommendation may introduce avoidable uncertainty and complications in the matter.

Clause 7.—This clause implements paragraph 66.II (vi) of the Report and is modelled on section 2 (4) of the U.K. Act.

Clause 8.—This clause implements the observations at the end of paragraph 66.I of the Report.

Clause 9.—This clause implements paragraph 66.IV i) of the Report and is modelled on section 4 of the U.K. (Act.

Clause 10.—This clause implements paragraph 66.V (iv) (c) and is modelled on section 10 of the U.K. Act, but there is a difference. The members of the police forces also have been brought within the purview of this

clause, the reason being that in principle, the case of a police constable is not distinguishable from that of a soldier, especially when the police force to which he belongs is maintained by the State. *Vide* Attorney General for New South Wales *vs.* Perpetual Trustee & Co. (1955), 1 All E.R. 846 (P.C.) at pp. 857-58. In the U.K. Act, the members of the police force have not been brought within the purview of section 10 of that Act mainly because the police forces there are maintained by the local authorities, the only exception being the Metropolitan police which is under the Secretary of State for Home Affairs.

Clause 11.—This clause implements paragraph 66.V of the Report and saves the Government from liability in respect of a large number of acts detailed therein.

Clause 12.—This clause saves pending proceedings.

Clause 13.—This clause makes a consequential and necessary amendment in the Fatal Accidents Act, 1855.

FINANCIAL MEMORANDUM

The Bill seeks to define the liability of Government in tort. It is not possible to assess the financial liability which Government will incur on the bringing into operation of this Bill when enacted, as a result of the torts committed by the Government or its employees, agents and contractors. That will depend on various factors, such as the number of torts committed, the number of suits instituted against the Government and the number of decrees for compensation passed in those suits against the Government. As it is not possible to foresee and visualise any of these matters, no estimate of the expenditure involved out of the Consolidated Fund of India (in case of the liability of the Central Government) is possible.

S. L. SHAKDHER,
Secretary.

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